Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	MB Docket No. 10-71
Related to Retransmission Consent	)	

COMMENTS OF DISH NETWORK L.L.C.

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DISH Network L.L.C. ("DISH") respectfully submits these comments in response to the Commission's March 3, 2011 Notice of Proposed Rulemaking regarding much-needed reforms to the retransmission consent process.[1]

INTRODUCTION AND SUMMARY

The retransmission consent process is broken. When millions of consumers lose an important service they already purchased, when the competitive pay-TV marketplace is undermined in the name of preserving a shrinking industry's legacy monopoly power, and when rural households are singled out for particularly harsh treatment, something has gone terribly wrong.

Consumers are subjected to the euphemistically labeled, programming "take-downs." A more accurate phrase would be broadcast industry "shake-downs." Millions of consumers in every region of the United States who pay their bills on time and expect access to local broadcast stations have been held hostage and had their service interrupted by broadcasters withholding retransmission consent in order to gain an unfair advantage in retransmission

[1] Amendment of the Commission's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, 26 FCC Rcd. 2718 (2011) ("*Notice*").

consent negotiations. In the stand-off between broadcasters and Multichannel Video Programming Distributors ("MVPDs"), only one party holds the ultimate right to take down programming: the local broadcaster. Broadcasters wield the power to keep that programming available, or take it down, during a retransmission consent negotiation.

Broadcasters are well aware of the market power they hold. Local and network broadcast programming is highly valued by consumers and widely recognized as a critical input for MVPD competition. MVPDs must have access to critical broadcast programming in order to compete with one another and deliver the fruits of robust competition to consumers. The broadcasters' exclusive right to distribute this must-have network and syndicated programming is underscored by myriad federal subsidies (they received billions of dollars worth of spectrum for free, at tremendous cost to the American taxpayer) and protections, including network non-duplication, syndicated exclusivity, sports blackout rules, and statutory "local-into-local" geographic limitations imposed on Direct Broadcast Satellite ("DBS") providers. Broadcasters increasingly abuse this market power in an effort to preserve their existing government-sanctioned monopolies and undermine competition in the MVPD market.

Consumers are the innocent bystanders harmed by broadcasters' bullying tactics. Relying on the Obama Administration's assurances that subscribers to cable and satellite TV need not acquire a digital-to-analog converter box after the digital TV transition, many DISH subscribers cannot simply use an over-the-air antenna to receive crucial programming during a broadcaster take-down. Moreover, rural households often cannot receive over-the-air broadcast signals at all, because broadcasters do not transmit at full power or have failed to build sufficient infrastructure, such as repeaters, to cover their entire Designated Market Area ("DMA"), despite receiving billions of dollars of spectrum free of charge on the premise that they would use that spectrum for the public benefit. The broadcasters' oft-stated claim that consumers can avoid the harmful impact of a take-down by switching to over-the-air reception is thus belied by the broadcasters' own failure to extend their signal to every household in the market. When a broadcaster takes down its signal from DBS, rural America is disproportionately harmed.

The broadcast industry's abuses and the resulting harm to consumers merit immediate Commission action. To that end, DISH agrees that the Commission should update the definition of what constitutes "good faith" in a retransmission consent dispute and herein recommends specific additions to the list of "per se" violations and further clarification of the "totality of the circumstances" test to address some of the blatantly anti-competitive broadcaster actions. For example, the Commission should conclude that it is bad faith for a party to refuse to agree to a temporary extension of a retransmission consent agreement if the parties are engaged in bona fide negotiations leading up to the expiration of such agreement.

The Commission should do everything in its power to correct the broadcasters' unfair leverage in negotiating retransmission consent deals, including but not limited to infusing greater competition against the local broadcaster's network programming monopoly by waiving the network non-duplication and syndicated exclusivity rules during a broadcaster take-down. Any such waivers, however, must be carefully designed to give equal benefit to all MVPDs, because DBS is subject to a different copyright statutory regime than cable. This is achievable. DISH recommends two options, including use of the "significantly viewed" station rules to offer neighboring network affiliates, to apply the waiver in a way that preserves parity among all MVPDs.

Finally, the Commission should avoid papering over the take-down crisis with hopelessly ineffective "remedies" instead of focusing on the broadcasters causing this crisis, or applying notice rules that in no way would address the economic harm befalling consumers.

DISCUSSION

I. THE CURRENT RETRANSMISSION CONSENT SYSTEM HARMS CONSUMERS AND UNDERMINES COMPETITION IN THE VIDEO MARKETPLACE.

The retransmission consent process established by Congress and implemented by the Commission almost 20 years ago ostensibly exists to facilitate meaningful negotiations between broadcasters and MVPDs so that consumers can see the programming they pay their MVPD to deliver and broadcasters can enjoy state-of-the-art distribution platforms. Today, however, consumers are subjected to the euphemistically labeled programming "take-downs." A more accurate phrase would be broadcast industry "shake-downs."

A. Broadcaster Take-Downs of Valuable News, Weather, Sports, Emergency Information, Political Coverage, and Network Programming Harm Consumers and Undermine Competition.

Millions of consumers in every region of the United States who pay their bills on time and expect access to television programming have been held hostage and had their service interrupted by broadcasters withholding retransmission consent in order to gain an unfair advantage in retransmission consent negotiations. The Commission stated its aim to "minimize video programming service disruptions to consumers."[2] Chairman Genachowski observed that "consumers have gotten caught in the middle" of carriage disputes between broadcasters and MVPDs.[3] DISH agrees.

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[2] *See Notice* ¶ 1.

[3] *Id*., Separate Statement of Chairman Genachowski.

Given the Commission's characterization of consumers as "innocent bystanders adversely affected when broadcasters and MVPDs fail to reach an agreement" and its goal to "protect consumers from the disruptive impact of the loss of broadcast programming,"[4] it is important first to establish the scope of the crisis so that the Commission may craft appropriate remedies. In the stand-off between broadcasters and MVPDs, only one party holds the ultimate right to take down programming: the local broadcaster. Broadcasters wield the power to keep that programming available, or take it down, during a retransmission consent negotiation. If a broadcaster and MVPD cannot reach an agreement, "then the MVPD may not retransmit the broadcasting station's signal because the signal cannot be carried without the broadcast station's consent."[5] Under the carriage agreements between DISH and broadcasters, it is the broadcaster who grants the retransmission consent, and therefore has the right to refuse a contract extension or interim carriage during a renewal negotiation.

DISH, despite its status as a leading MVPD, has been unable to prevent multiple take-downs by broadcasters.[6] Broadcasters demand fee increases many times the rate of inflation and orders of magnitude over the current rates, and sometimes attempt to require carriage of programming subscribers neither want nor would be willing to pay for on a stand-alone basis. If DISH were to accede to all of the broadcasters' demands, it would have neither an attractively priced product nor a channel lineup remotely resembling what consumers desire. DISH chooses to fight for its subscribers and the American consumer.

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4 *Id*. ¶ 17.

5 *Notice* ¶ 7 (citing 47 U.S.C. 325(b)(1)). *See also Notice*, Separate Statement of Commissioner Robert M. McDowell ("…Section 325 states that television signals may not be carried without the 'express' consent of the broadcaster").

6 With over 14 million subscribers spread among all of the 50 states, DISH is the second largest DBS provider and the third largest MVPD in the U.S., behind Comcast and DIRECTV.

For example, earlier this year, LIN TV Corp. ("LIN"), a major independent broadcast station group, took down its programming from over 1 million DISH subscribers in 17 markets. In late 2008, through mid-2009, Fisher Communications, Inc. ("Fisher"), another major independent broadcast station group, impacted hundreds of thousands of DISH subscribers by taking down its programming from DISH in seven markets. And, although DISH was able to reach, at the eleventh hour, a new retransmission consent agreement in 2010 with FOX owned-and-operated stations, the mere specter of a takedown negatively impacted DISH for months thereafter. These instances, among all the broadcaster take-downs DISH experienced, stand out for their impact on consumers and the competitive MVPD marketplace.

Importance of Local Broadcast Stations to Consumers

The LIN and Fisher take-downs, like every other broadcaster take-down, impacted network and local programming that consumers rely upon. The Commission, industry analysts, and broadcast advocates describe the critical nature of the programming broadcasters offer. The Commission recognizes that broadcast programming is "highly valued by consumers. . ."[7] Congress, too, has "recognized the importance of local television broadcast signals . . . as providers of a valuable public service. . ."[8] Industry observers note the value consumers place on local broadcasting and the leverage this gives station owners.[9]

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[7] *See* General Motors Corp. and Hughes Electronics Corp., Transferors and The News Corp., Transferee, For Authority to Transfer Control, *Memorandum Opinion and Order,* 19 FCC Rcd. 473, 565 ¶ 201 (2004) ("*News Hughes Order*").

[8] *See id.* ¶ 48.

[9] *See* Robert Marich, *Broadcast's $1 Billion Pot of Gold*, Broadcasting & Cable, July 6, 2008, *available at* http://www.broadcastingcable.com/article/114424-Broadcast_s_1_Billion_Pot_of_Gold.php (last visited May 27, 2011) ("analysts say the Big Four network affiliates are in the best position to negotiate sizeable fees, given that they have highly watched network programs and also tend to have strong local news[;] broadcasters with popular local sports also have leverage. . . .")

The broadcast industry itself eloquently states the uniquely critical nature of network and local broadcast programming as an irreplaceable source of emergency information, news, weather, political coverage, sports, and entertainment:

> Local broadcasting is a trusted – and vital – source of local journalism…Broadcasters also provide the public with timely and often life-saving emergency information as well as other valuable programming, from sports and weather to network and syndicated programming. [Local broadcasters also] enhance political discourse by providing coverage of campaigns, elections, and political debates... [10]

Broadcasters tout the superiority of their programming over niche non-broadcast services. Gordon Smith, the CEO of the National Association of Broadcasters, recently asserted that "[i]t's great you can get BBC World News and Al Jazeera on your iPhone. But isn't it a greater value for a community to get local Channel 4?"[11]

In the name of sustaining this critical programming, the broadcasting industry in the United States has acquired an array of protectionist statutes and regulations, as well as public subsidies at tremendous cost to the American taxpayer, from billions of dollars worth of free spectrum licenses (in contrast to the DBS and wireless telephony industries, which spent billions of dollars acquiring licenses at auction) to exclusivity rules discussed in greater detail below, thus enshrining broadcasters' local monopolies. Given that access to broadcast programming is so important to consumers, and given that broadcasters with government-sanctioned monopolies hold unilateral power over such programming, broadcaster take-downs

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[10] National Association of Broadcasters Comments, *Examination of the Future of Media and Information Needs of Communities in a Digital Age*, GN Docket No. 10-25, pp. iii, 1, 2, 8 (May 7, 2010).

[11] Press Release, National Association of Broadcasters, *Gordon Smith Keynote Address at 2011 NAB Show* (Apr. 12, 2011), *available at* http://www.nab.org/documents/newsRoom/pressRelease.asp?id=2506 (last visited May 27, 2011).

cause irreparable harm to the "innocent bystanders" who lose critical emergency information, news, weather, political coverage, sports, and entertainment.

Importance of Local Broadcasting to Competition

Congress, the Commission, and the courts view local broadcast stations as a critical input to sustain competition within the MVPD market. Just as airlines could not compete with one another without equal access to jet fuel, so must competing cable, DBS, telco, and other MVPDs have access to critical broadcast programming in order to compete with one another and deliver the fruits of robust competition to consumers. For example, Congress "recognized the importance of local television broadcast signals . . . as 'must-have programming' critical to a DBS offering" when authorizing "local-into-local" authority and other related statutes.[12] The advent of such authority greatly expanded the penetration of DBS as an alternative to cable,[13] fostering intense price, service, and innovation competition benefitting all MVPD subscribers. Federal court actions have underscored the competitive importance of broadcast programming to sustaining a competitive MVPD service.[14]

Unfortunately, broadcasters have a government-sanctioned monopoly over network programming within a given local market (Nielsen DMA). This means that when one MVPD is subjected to a broadcaster takedown, that MVPD is no longer able to provide consumers in that local market with network programming. For example, if the local FOX affiliate orders

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[12] *See News Hughes Order* ¶ 48.

[13] *See id.* ¶¶ 202-04 ("carriage of local television broadcast station signals is critical to MVPD offerings [and] DBS penetration has increased more rapidly in markets where local-into-local service is available") (footnotes omitted). *See also id.* ¶ 48 ("Congress had recognized the importance of local television . . . as 'must-have programming' critical to a DBS offering").

[14] *See, e.g., EchoStar Satellite L.L.C. v. Viacom, Inc.*, 2004 WL 439984 (N.D. Cal. Jan. 16, 2004) (issuing temporary restraining to require Viacom to continue to provide CBS programming for carriage on DISH Network, finding that EchoStar would be immediately and irreparably injured if the programming were withdrawn).

DISH to take down its broadcast signal, DISH is left unable to offer any FOX network programming to its subscribers in that local market. This imbalance of power exists because the local broadcast affiliate is granted contractual exclusivity by the network affiliation agreement. Federal copyright and communications law further gird the local monopoly with multiple statutes and regulations, including: the network non-duplication rule; the syndicated exclusivity rule; the sports blackout rule;[15] and for DBS, the geographic limitations of the "local-into-local" compulsory copyright license.[16] The government deliberately established this framework of rules that effectively sanction local broadcaster monopolies. As a result, it is incumbent on the government to do whatever is necessary to correct the imbalance of power and ensure that consumers are protected.

Not surprisingly, the unilateral actions of the broadcaster against any one of its multiple MVPD distributors causes great market disruption and undermines competition. DISH is encouraged that the Commission acknowledges the increased disparity in negotiating leverage between the single local network affiliate broadcaster exclusively controlling key programming in its market, and the multiple MVPDs in that local market competing with one another for market share.[17] The Fisher take-down of programming from DISH demonstrated this

[15] *See* 47 C.F.R. §§ 76.92 *et seq*., 76.101 *et seq*., 76.122, 76.123, 76.67.

[16] *See* 17 U.S.C. § 122 (restricting "local-into-local" retransmissions to the DMA of origin).

[17] "In 1992, the only option for many local broadcast television stations seeking to reach MVPD customers in a particular [DMA] was a single local cable provider. Today, in contrast, many consumers have additional options for receiving programming, including two national [DBS] providers, telephone providers that offer video programming in some areas, and, to a degree, the Internet." *Notice* ¶ 4. The robust competition among multiple MVPDs, while beneficial to the public interest, also enables broadcasters to run advertisements telling consumers to defect to a new MVPD, effectively playing one MVPD off another. Not only does this inconvenience consumers, but there is no guarantee that the new MVPD will not itself be required by a broadcaster to take down a station when its own retransmission agreement expires.

competitive imbalance with stunning clarity. Fisher owns or owned eight ABC, CBS and/or FOX affiliates and two Univision affiliates across seven DMAs (Bakersfield, CA; Boise, ID; Eugene, OR; Idaho Falls et al., ID; Portland, OR; Seattle-Tacoma, WA; and Yakima et al., WA). As a result of a retransmission consent dispute, DISH was unable to carry Fisher's local affiliates from December 17, 2008 to June 10, 2009.

The impact on DISH's ability to compete, and thus the benefit to all consumers of competing MVPDs in the Fisher markets, was profound:

- Subscriber churn, often used by industry analysts as a metric indicating customer dissatisfaction, spiked dramatically.
- By contrast, in comparable non-Fisher markets, DISH's churn rates remained steady or even improved.
- DISH experienced a significant loss of penetration in the affected markets throughout the take-down period. This loss of market share persisted even after DISH regained retransmission rights, because the impacts of take-downs linger in distribution channels long after the programming is restored.
- By contrast, penetration in comparable, unaffected markets was steady or improved during the period.[18]

The data speak unambiguously: broadcaster take-downs significantly undermine MVPD competition.

B. Consumers Bear an Unfair Burden When a Broadcaster Takes Down Its Station, Especially Now That Digital Converter Coupons No Longer Are Available.

Neither the powerful broadcasters nor competing MVPDs suffer the most from a programming take-down. Consumers are the "innocent bystanders adversely affected" when a

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[18] *See* Letter from Pantelis Michalopoulos, Counsel for DISH Network L.L.C. to Marlene H. Dortch, Sec'y, FCC, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licenses*, Declaration of Vincent Kunz, MB Docket No. 10-56, ¶¶ 5-6 (filed June 7, 2010).

broadcaster pulls its programming.[19] This is so, not only because the consumer loses an important service she already purchased, but because the options often are limited or non-existent. The notion that a consumer need only use an over-the-air antenna to receive local broadcast stations during a take-down ignores actual facts on the ground. Many consumers do not own televisions capable of receiving digital over-the-air TV signals and therefore cannot simply use an antenna to receive broadcast programming.

Before the digital transition, the Obama Administration—through the Commission, the National Telecommunications and Information Administration ("NTIA"), and a broad array of public service announcements—assured American consumers that if they had cable or satellite TV, they were not at risk of losing their television programming after the digital transition.[20] Millions of consumers with analog receivers, relying on the Obama Administration's assurances, did not avail themselves of the NTIA coupon program subsidizing the purchase of an analog-to-digital converter box. That coupon program has ended, and many consumers may not be set up for digital TV reception. It is therefore disingenuous for broadcasters to suggest that over-the-air reception always prevents consumers from experiencing service disruptions.

C. Rural Consumers Are Particularly Hard-Hit by Broadcaster Programming Take-Downs from DBS Providers.

Whatever problems accrue to consumers and competition generally from broadcaster take-downs, those problems magnify for the rural consumer. Rural households often cannot receive over-the-air broadcast signals because broadcasters do not transmit at full power or

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[19] *Notice* ¶ 17.

[20] *See, e.g.*, "Preparing for the Digital Television Transition," National Telecommunications and Information Administration, U.S. Dept. of Commerce, April 2007, *available at* http://www.ce.org/NTIA_-_Preparing_For_The_DTV_Transition.pdf (last visited May 27, 2011) ("What are your options? …Hook up your television to cable, satellite, or other pay television service").

have failed to build sufficient infrastructure, such as repeaters, to cover their entire DMA, despite receiving billions of dollars worth of spectrum for free at great expense to the American taxpayer. The broadcasters' failure to ensure that their signals always reach every household in their market is a critical fact in the present debate. Broadcasters have the luxury of relying on DBS providers to extend the availability of station signals to rural consumers not reached by the over-the-air signal, while at the same time holding these households hostage when broadcasters demand massive retrans rates increases. Any claims by the broadcasters that the consumer impact of a take-down is mitigated by the backup option of over-the-air reception are empty unless all households actually can receive the signal.

The failure of broadcasters to deploy their signals to all households in the local market has worsened post-DTV transition. The Commission eliminated the Grade B signal replication rule prior to the digital transition.[21] In so doing, the Commission allowed broadcasters during the digital transition to serve a smaller geographic area than they had with analog signals. Even if digital signals replicated the analog Grade B footprint, however, that still would not cover all the nation's DMAs with broadcast signals. Many households throughout the United States, particularly in Western DMAs that cover vast rural areas, simply do not receive an adequate over-the-air broadcast signal.

According to the FCC's DTV Reception maps, the following DMAs are examples of markets that are not fully covered by broadcast signals, including the communities that have

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[21] *See* Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, *Memorandum Opinion and Order on Reconsideration*, 16 FCC Rcd. 20594, 20602-03, ¶¶ 20-22 (2001) (Commission expected "that DTV broadcasters would eventually choose to replicate their NTSC service areas to serve their viewers" but did not require such replication because it "wanted to give broadcasters a measure of flexibility as they build their DTV facilities to collocate their antennas at common sites, thus minimizing potential local difficulties locating towers and eliminating the cost of building new towers").

disproportionately high numbers of households unable to receive at least one network-affiliated station signal:[22]

<u>Examples of Communities Underserved by Big 4 Broadcast Station Signal</u>

DMA	Community Affected	"Big 4" Digital Broadcast Signals Received	Missing "Big 4" Networks
Denver, CO	Steamboat Springs, CO	None	ABC, CBS, FOX, NBC
Fargo-Valley City, ND	Cavalier, ND	WDAZ-TV (ABC); KNRR (FOX)	CBS, NBC
Medford-Klamath Falls, OR	Lakeview, OR	KOTI (NBC)	ABC, CBS, FOX
New York, NY	Ellenville, NY	WRGB (CBS)	ABC, FOX, NBC
Phoenix, AZ	Globe, AZ	KPNX (NBC); KPHO-TV (CBS)	ABC, FOX
Spokane, WA	Lewiston, ID	KLEW-TV (CBS); KHQ-TV (NBC)	ABC, FOX

[22] Data in the following table was formulated using a combination of the three sources cited below. The analysis determining whether a particular station's signal covers a given community is based on an extremely conservative standard that considers the community served if information from any one of the three sources shows it as such, even if the other two sources show that community as unserved. *See* "DTV Reception Maps," *available at* http://transition.fcc.gov/mb/engineering/maps/ (last visited May 27, 2011) (showing signal availability/strength calculations based on the traditional TV reception model assuming an outdoor antenna 30 feet above ground level and based on a terrain-sensitive propagation model resembling but not identical to the propagation model used when calculating service and interference contours for licensed broadcast television stations). *See also* "Updated Maps of All Full-Service Television Stations Authorized by the FCC," *available at* http://transition.fcc.gov/dtv/markets/ (last visited May 27, 2011) (providing maps illustrating each station's digital TV coverage as compared to its analog TV coverage, employing standard engineering techniques used by the FCC). *See also* Interactive TV Coverage Browser, TV Fool, *available at* http://www.tvfool.com/?option=com_wrapper&Itemid=90 (last visited May 27, 2011) (offering a mapping tool to browse TV transmitters in a given area and see over-the-air coverage maps).

This lack of broadcast signal coverage in rural America has led DBS to be the video service of choice. DBS penetration is highest in rural areas where broadcasters provide inadequate signal coverage and cable operators and telephone companies do not provide MVPD service. Moreover, DISH has positioned itself as the low-cost alternative to DIRECTV, such that price-sensitive consumers generally choose DISH over DIRECTV.

Thus, when a broadcaster takes down its signal from DISH, price-sensitive consumers in rural America generally are left without important emergency information, news, weather, sports, and political discourse. This is patently unfair to rural households, particularly given that broadcasters attempt to extract drastic rate increases from the very DBS providers they also depend upon to extend the reach of station signals to rural consumers not reached by the over-the-air signal.

II. BROADCASTERS' RECENT BEHAVIOR DURING RETRANSMISSION CONSENT NEGOTIATIONS REFLECTS A PROPENSITY TO HURT CONSUMERS AND AN AVERSION TO COMPROMISE.

In this crisis impacting television viewers, one party usually instigates a programming take-down: the broadcaster. In DISH's experience, consumers lose programming overwhelmingly because of broadcasters' behavior, and that behavior is only getting worse.

<u>Local Broadcaster Abuses</u>

Broadcasters increasingly abuse their government-sanctioned market power and unilateral take-down authority. LIN, during its most recent negotiations with DISH in March and April of this year, willfully acted in an obstructionist manner and ultimately took its programming down.

- LIN repeatedly failed to respond in a timely manner to counter-proposals offered by DISH.

- LIN offered minimal changes in its fee demands (decrease of 1%), while DISH made substantial concessions.

- LIN refused to grant the contract extension DISH proposed, which would have kept the broadcast signals up until at least March 18, 2011, because the extension, according to LIN, contained too many conditions. However, DISH simply asked that neither party announce publicly the duration of the temporary extension (so that consumers need not be drawn into the negotiating process) and proposed a short press statement.

- When LIN rejected the extension offer, DISH offered a shorter, 48 hour extension, subject to no conditions whatsoever. LIN ignored the proposed extension.

- DISH was forced by LIN to take down LIN's signals from DISH's system rather than enter a short-term extension.[23]

In addition to overt programming take-downs, broadcasters apparently also have coordinated with one another to prevent DBS providers from using legal alternatives to provide network programming during a take-down. In particular, broadcasters consistently refuse to grant DBS providers consent to provide their signals into counties were the Commission has determined the stations to be "significantly viewed" ("SV"). DISH in many instances would have carried an out-of-market SV station, but for a local broadcaster's request or requirement to the contrary. Finally, broadcasters appear to be deliberately abusing their market power to pick and choose winners and losers in the MVPD market, selecting some distributors for punishment and others for benefits. One local Bismarck, North Dakota broadcaster, in asking DISH to accept its retransmission consent terms, reminded DISH that popular sports and entertainment programming would be aired around the contract renewal time. It also intimated that some cable operators likely would suffer take-downs due to retransmission consent disputes with the station. DISH's "gain in subscribers is likely to be substantial" if it carried the local broadcaster's signal during such cable take-downs, the broadcaster suggested. Finally, the

[23] E-mails between LIN and DISH Network executives during this period have been provided to the Commission.

broadcaster said it would be more than willing to "cooperate with a marketing campaign to maximize" the benefit to DISH while the broadcaster's programming was missing from competing cable systems.[24]

The broadcaster knew it had the ability to undermine competition in the MVPD market and was offering to do so. The majority of the broadcast industry probably employs the same *modus operandi.*

<u>Broadcast Network Abuses</u>

DISH has become aware of instances where networks exert undue control over their affiliates' retransmission consent rights. Most worrisome, broadcast networks have extracted from some of their affiliates the right to control retransmission consent negotiations, demanding higher rates and invoking programming take-downs. According to press reports, NBC recently announced that it had reached an agreement with its affiliates for just that purpose, which, among other things, raises substantial antitrust concerns.[25] In another case, the same small broadcaster in Bismarck that asserted its ability to choose winners and losers among MVPDs pleaded for help against the pressure its affiliated network, Fox, was exerting:

> [W]e are in a box. There is no flexibility on the rates that we have to pass through to Fox for retransmission consent. . . In order to maintain our relationship with Fox we are required to establish rates [Fox seeks]. . . If you can use your influence to reduce the amount that Fox is demanding from us, we will pass that savings on to you.[26]

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[24] Letter from Gary O'Halloran, General Manager/Owner, KNDX Fox 26/KNXD Fox 24, to R. Stanton Dodge, Executive Vice President and General Counsel, DISH Network, April 28, 2011, at 1 ("O'Halloran Letter").

[25] *See* Michael Malone, *NBC, Affiliates Iron Out Blanket Retrans Deal*, Broadcasting & Cable, May 16, 2011, *available at* <u>http://www.broadcastingcable.com/article/468357-NBC_Affiliates_Iron_Out_Blanket_Retrans_Deal.php</u> (last visited May 27, 2011).

[26] O'Halloran Letter at 1.

It is widely acknowledged that networks increasingly exert their market power over independent affiliates by demanding more programming time, fewer local preemptions, and control over the local broadcaster's retransmission consent terms and conditions. Networks and their media conglomerate parent companies possess even more leverage than do independent broadcast station groups. Networks use this leverage, first against their own affiliates to gain control over the retransmission consent rights, as described above, then against MVPDs, who in turn are forced to pay exorbitant fee increases and carry the networks' affiliated non-broadcast programming at the expense of other, independent programming. Like the local affiliates, the networks are contributing to the take-down crisis.

The government-sanctioned monopoly held by network affiliated broadcasters, combined with their propensity to commit anti-competitive acts, suggests that an abuse of market power and/or coordinated activities among competitors may be occurring, in derogation of antitrust laws. Specifically, federal courts and antitrust enforcement agencies have found that basic antitrust principles are violated where, as here, a firm with market power abuses that power to diminish competition in related markets.[27]

Moreover, federal antitrust laws prohibit horizontal coordination among competitors that reduce competition.[28] Local broadcasters compete against one another for advertising

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[27] *See, e.g., U.S. v. Microsoft Corp.*, 253 F.3d 34, 50-80 (D.C. Cir. 2001); Application for Consent to the Transfer of Control of Licenses by General Electric Company, Transferor, to Comcast Corporation, Transferee, *Memorandum Opinion and Order*, 2011-1 Trade Cases P 77312, 52 Communications Reg. (P&F) 249, 2011 WL 194538 (F.C.C.) ¶ 102 (2011).

[28] *See, e.g.*, Sherman Anti-Trust Act, 15 U.S.C. § 1 (prohibiting "contract[s], combination[s] . . . and conspiracy[ies] in restraint of trade"); U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 7.1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html#1 (last visited May 27, 2011) (stating that the DOJ and FTC may challenge transactions that "pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place [particularly where the market] shows signs of

dollars in the same DMA and broadcast conglomerates compete against each other nationally. As the only MVPD in the United States that negotiates retransmission consent agreements with broadcasters in all 210 DMAs, DISH is in a unique position to detect coordinated efforts by broadcasters striving to diminish competition. Upon information and belief, based on interactions with all local broadcasters or their representatives, DISH believes that the broadcasters' similar retransmission consent rates, terms, and conditions, along with broadcasters' patterns of behavior, indicate a likelihood of illegal coordination among broadcasters.

III. THE COMMISSION SHOULD UPDATE THE "GOOD FAITH" STANDARD TO ADDRESS BROADCASTERS' INCREASINGLY OBSTRUCTIONIST TACTICS IN AVOIDING NEGOTIATED, MEDIATED, OR LONG-TERM DISPUTE RESOLUTION.

The broadcast industry's abuses and the resulting harm to consumers merit immediate Commission action. To that end, DISH agrees that the Commission should update the definition of what constitutes "good faith" in a retransmission consent dispute. As the Commission observed, "the actual and threatened service disruptions" stemming from retransmission consent disputes are harming consumers and the rapidly deteriorating circumstances "support reevaluation of the good faith rules, particularly to ameliorate the impact of retransmission consent negotiations on innocent consumers."[29]

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vulnerability to coordinated conduct [and there is] a credible basis on which to conclude that the merger may enhance that vulnerability"); *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208, 221-22, 59 S.Ct. 467,472 (1939) (finding that interstate distributors of motion picture films agreed among themselves to impose certain restrictions on subsequent run exhibitors was a violation of Section 1 of the Sherman Anti-Trust Act).

[29] *Notice* ¶ 20 (footnotes omitted). *See also id.* ¶ 21 ("…additional *per se* good faith negotiation standards could increase certainty in the marketplace, thereby promoting the successful completion of retransmission consent negotiations and protecting consumers from impasses or near impasses").

A. The "Good Faith" Standard Should Facilitate Negotiation and Mitigate Anti-Competitive Actions by Broadcasters.

The "good faith" standard should promote negotiated dispute settlements and avoid collateral damage to consumers. Congress and the Commission intended the standard to promote efficient negotiations and minimal consumer disruption, and in particular to impose on broadcasters a duty above and beyond that found in common law.[30] In implementing the statute, the Commission sought to promote an "atmosphere of honesty, purpose and clarity of process."[31] While the Commission has concluded that it may not review the substantive merits of a party's negotiating position, it also has ruled that the good faith standard is "intended to identify those **situations in which a broadcaster did not enter into negotiations with the sincere intent** of trying to reach an agreement acceptable to both parties."[32] Moreover, in borrowing heavily from labor law to construct the good faith standard,[33] the Commission underscored its desire to avoid take-downs, much as labor law is intended to avoid harmful and disruptive work stoppages.

Neither Congress nor the Commission ever intended broadcasters to use retransmission consent negotiations for anti-competitive purposes, yet NBC has done precisely that by

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[30] *See* Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, *First Report and Order*, 15 FCC Rcd. 5445, 5448 ¶ 24 ("*Good Faith Order*") ("Congress has signaled its intention to impose some heightened duty of negotiation on broadcasters in the retransmission consent process" including obligations "greater than those under common law[,]" which merely prohibits fraudulent intent).

[31] *See Notice* ¶ 11, *citing Good Faith Order* ¶ 24.

[32] *See Good Faith Order* ¶ 39 (emphasis added).

[33] *See id.* ¶ 22 (Commission agreed "with those commenters suggesting that the good faith bargaining requirement of Section 8(d) of the Taft-Hartley Act is the most appropriate source of guidance [and believed] that the good faith negotiation requirement of SHVIA is best implemented through the following standards derived from NLRB precedent [among other things]").

inserting itself into retrans negotiations between local affiliates and MVPDs.[34] Quite to the contrary, the Commission has stated in no uncertain terms that, under the statute,

> any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement. . . . Conduct that is violative of national policies favoring competition -- that is, for example, intended to gain or **sustain a monopoly**…or involves the **exercise of market power in one market in order to foreclose competitors from participation in another** market -- is not within the [scope of permissible actitivies] in the statute.[35]

Congressional and Commission principles are being undermined. As illustrated by the LIN and Fisher examples, above, there are indeed instances when broadcasters appear to be entering into negotiations without any "sincere intent" of trying to reach an agreement acceptable to both parties. As the DISH churn data and broadcaster statements reveal, broadcasters' unilateral monopoly power to take down key programming appears to be used to "sustain a monopoly" and involves the "exercise of market power" in the programming market in order to foreclose competition in the MVPD market. Clearly, the Commission should act to reverse this trend and can do so by updating the good faith standard.

B. The Commission Should Add to the List of "Per Se" Good Faith Violations and Clarify that Anti-Competitive Actions Fail the "Totality of the Circumstances" Test.

The record of broadcaster abuses in retransmission consent negotiations supports amending the good faith standard, both by adding specific items to the list of "per se" violations and clarifying the "totality of the circumstances" test to include knowing and willful anti-competitive actions.

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[34] *See supra* note 25.

[35] *See Good Faith Order* ¶ 58 (emphasis added), *citing* 47 U.S.C. § 325(b)(3)(C) (emphasis added).

First, the Commission should conclude that it is bad faith to "refuse to put forth bona fide proposals on important issues."[36] LIN's behavior in its negotiations with DISH illustrates the need for such a rule, given DISH's repeated efforts to engage on substantive issues and the silence from the other side of the negotiating table. Moreover, to mitigate take-downs and expedite resolution of disputes, the amended rule should address a party's failure to respond and send a counter offer within 48 hours to a bona fide proposal from the other side during the 30 days before the current retransmission agreement expires, and within 24 hours after the agreement has expired. The Commission may define an "important issue" as anything that the broadcaster itself declares important enough to merit a take-down.

Second, the Commission should conclude that it would be bad faith for a party to "refuse to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of their retransmission consent agreement."[37] LIN's and Fisher's behavior in their negotiations with DISH illustrate the need for this rule. In each of these instances, the broadcaster refused to move toward a compromise position, while DISH moved more willingly to the middle. Non-binding mediation, which the Commission correctly concludes is within its authority to impose,[38] would serve to bring parties to agreement because, among other things, the mere preparation for such proceedings often brings parties to the middle. DISH has learned that, while "baseball-style" mandatory arbitration yields the best results, the mere presence of an independent third party in a negotiation tends to inspire a greater degree of rationality and less posturing by the parties.

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[36] *Notice* ¶ 24.

[37] *Id*. ¶ 25.

[38] *Id*.

The Commission asks whether long-term MVPD subscriber contracts make it more difficult for a consumer to switch MVPDs during a broadcaster take-down.[39] DISH offers a range of contractual options to its subscribers, including (a) pre-paid; (b) subscriber set-top box purchase in lieu of lease; and (c) a range of medium-and long-term contractual options. DISH is the low-cost alternative in the MVPD market and designs its subscriber plans with an eye towards affordability. Before taking the draconian step of interfering with a contractual relationship designed to keep consumer rates low, the Commission should amend the "per se" list of violations, as DISH recommends, to create an incentive for broadcasters to agree to contract extensions during negotiations in order to avoid any programming loss to consumers in the first place.

Third, the Commission should conclude that it is bad faith if a broadcaster or MVPD "repeatedly insists on month-to month retransmission consent agreements or a new agreement term of less than one year."[40] Such short term agreements require the parties to renegotiate agreements more frequently, fostering uncertainty and undue burden on the part of MVPDs attempting to secure retransmission rights to programming for the benefit of their subscribers.

Fourth, the Commission should conclude that it is bad faith for a party to refuse to agree to a temporary extension of a retransmission consent agreement if the parties are engaged in bona fide negotiations leading up to the expiration of such agreement. LIN's behavior in its negotiations with DISH illustrates the need for such a rule. DISH repeatedly offered to extend the agreement to allow for further negotiations, consistent with the letter and

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[39] *Id.* ¶ 30 (asking whether "Early Termination Fees" related to long-term subscriber contracts have on consumers' ability to change MVPDs).

[40] *Id.* ¶ 26.

spirit of the good faith standard, but was rebuffed. The Commission should deem a negotiation to be "bona fide" if, among other things, the parties have exchanged written terms and conditions.

Fifth, unwarranted broadcaster delegation of retransmission consent authority should be deemed "bad faith." Networks' abuse of market power to obtain the retransmission consent rights of local broadcasters, as illustrated above by the Bismarck broadcaster, proves the need for such a rule. In addition to raising substantial antitrust concerns, the Commission correctly observes that it is bad faith for a station to agree to give an affiliated network the right to negotiate on behalf of the local affiliate or demand the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision.[41]

The Commission also asks "how frequently a network's assertion of the right to review or approve an agreement affects negotiations."[42] While there are blatant examples, such as Fox Network apparently forcing its affiliates to demand specific rates, DISH cannot state definitively how many of the network affiliates with which it negotiates have assigned retransmission consent authority to the affiliated network. An independent broadcaster may be acting at a network's direction without DISH's knowledge. As the only MVPD that carries local broadcasters in every market, however, DISH is in a unique position to state that the

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[41] *Id.* ¶ 22 ("If a station has granted a network a veto power over any retransmission consent agreement with an MVPD, then it has arguably impaired its own ability to designate a representative who can bind the station in negotiations, contrary to [FCC] rules"). *See also Notice* Appendix B, Proposed Rule Changes, draft 47 C.F.R. § 76.65(b)(1)(viii) ("Agreement by a broadcast television station Negotiating Entity to provide a network with which it is affiliated the right to approve the station's retransmission consent agreement with an MVPD").

[42] *Notice* ¶ 22.

influence of networks is being felt in multiple negotiations with affiliates, given the pattern of rate increases nationwide.[43]

Sixth, taking down programming during a retransmission consent dispute where a broadcaster has failed to build out its transmission infrastructure to cover the entire DMA should be deemed "bad faith." The failure of broadcasters to serve their entire DMAs at the same time that they take down programming merits action by the Commission. Rural Americans should not be singled out for disproportionately poor treatment by the Commission. Broadcasters' abuse of their monopoly power, in derogation of the Commission's intent to use the good faith standard against such actions, is particularly acute in rural areas where an over-the-air signal is not available.

Given the impact on viewers' health and safety of local news, weather, and emergency information that the broadcasters themselves claim are indispensible, the Commission should protect rural consumers who lack over-the-air or cable options from being entirely cut off from such programming. The Commission, in adopting this "per se" violation rule, would protect consumers who have been ignored by broadcasters and incentivize broadcasters to better serve their entire DMAs.

Seventh, the Commission should conclude that it is bad faith when a "broadcaster requests or requires, as a condition of retransmission consent, that an MVPD not import an out-of-market 'significantly viewed' station" or export its signals as a significantly viewed

[43] The Commission should "abrogate any provisions restricting an affiliate's power to grant retransmission consent without network approval that appear in existing agreements. . . ." *Notice* ¶ 22. Similarly, the Commission correctly concludes that it is bad faith for a "station to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned" and therefore should "abrogate any such terms that appear in existing agreements…" *Id*. ¶ 23.

station.[44] Broadcasters should not be allowed to undermine statutory and regulatory policy by abusing their market power in private negotiations. This, too, is an abuse of market power to "preserve a monopoly," precisely the type of activity the Commission sought to avoid. DISH has stated in a related proceeding that the Commission should "clarify that tying retransmission consent to restrictions on SV station carriage" violates the good faith negotiation standard.[45]

DISH agrees that it is time to interpret the good faith standard "to preclude a broadcast station from executing an agreement prohibiting an MVPD from importing an out-of-market SV station that might otherwise be available to consumers as a partial substitute for the in-market station's programming, in the event of a retransmission consent negotiation impasse."[46] Similarly, broadcasters should not be permitted to prohibit use of their own signals as a SV stations. Broadcaster threats to delay or refuse to reach a retransmission consent agreement unless an MVPD agrees it will not import out-of-market SV stations or export its signal circumvent the letter and spirit of the good faith standard. The Commission's intent to use the good faith standard to prohibit anti-competitive acts by broadcasters is undermined when broadcasters use their market power to "preserve" their monopoly and foreclose any new competition, in this instance by undercutting the Commission's own rules allowing alternative forms of network programming delivery—SV stations.

Finally, the "totality of the circumstances" test needs further clarification to include any action taken by a broadcaster knowingly and willfully to undermine competition in the MVPD

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[44] *Id*.

[45] *Id*. (citations omitted).

[46] *Id*.

market.[47] DISH believes that broadcasters act deliberately to undermine competition in the MVPD market by selecting some distributors for punishment and other distributors for benefits. The Bismarck broadcaster cited above is but one of many examples of a broadcaster abusing its market power to undermine MVPD competition. The Commission should clarify that any such knowing and willful anti-competitive action fails the "totality of the circumstances" element of the good faith standard.

Broadcasters' past arguments for a more lenient "good faith" standard have been eroded by their recent behavior. In the initial good faith implementation proceedings, broadcasters suggested that "the purpose of the good faith requirement is merely to bring the parties to the bargaining table."[48] Fox argued that "the specific actions that would constitute lack of good faith should be 'narrowly drawn to encompass only the most obvious and egregious breaches of good faith negotiating practices. . . .'"[49] DBS providers, however, warned of the need to stipulate the precise types of prohibited anti-competitive behavior.[50] The DBS position has been proven correct.

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[47] "We seek comment on whether to provide more specificity for the meaning and scope of the 'totality of the circumstances' standard of Section 76.65(b)(2) of our rules, in order to define more clearly the instances in which a Negotiating Entity may violate this standard." *Notice* ¶ 33.

[48] *See Good Faith Order* ¶ 16.

[49] *See id*. ¶ 28.

[50] *See* Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligation, *Report and Order*, 20 FCC Rcd. 10339, 10343-44, ¶¶ 10 ("EchoStar argues that the Commission should clarify that tying [among other things] is not consistent with competitive marketplace conditions if it would violate the antitrust laws").

IV. THE COMMISSION SHOULD ELIMINATE OR, ALTERNATIVELY, FORBEAR FROM ENFORCING THE NETWORK NON-DUPLICATION AND SYNDICATED EXCLUSIVITY RULES DURING BROADCASTER PROGRAMMING TAKE-DOWNS ONLY IN A COMPETITIVELY NEUTRAL MANNER AMONG MVPDS.

The Commission should address the current market distortion stemming from a single broadcaster with market power negotiating with multiple, competing MVPDs. A true market-based solution would introduce more competition to the local broadcaster. Waiving the network non-duplication and syndicated exclusivity rules during a take-down, thereby allowing an MVPD to bring in a near substitute—the network programming from a neighboring market—would introduce competition to the local broadcaster not experienced today.

Merely waiving the network non-duplication and syndicated exclusivity rules without further action, however, would create a competitive disadvantage for DBS. Any attempt to infuse greater competition into the retransmission consent process must apply with equal force to cable and DBS in order to enhance, rather than undermine, competition in the market.[51] A failure to do so simply would exacerbate the competitive imbalance in the MVPD market exploited by broadcasters. In particular, unlike cable, satellite must avail itself of the distant network signal compulsory copyright license when retransmitting a local signal outside its DMA of origin to unserved households.[52] The statute defines an unserved household based on a predictive model, rather than whether a household actually receives an over-the-air signal, so even when a household cannot receive network programming from a local broadcast station due to a take-down, it still is deemed to be "served."

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[51] The *Notice* rightly asks how limited application of the exclusivity rules would apply to DBS if the Commission were to "eliminate the rules as they apply to cable and whether eliminating rules as to cable systems would create undue disparities or unintended consequences for DBS." *See Notice* ¶ 45.

[52] 17 U.S.C. §§119, 122.

DISH believes, however, that solutions are readily available. A satellite carrier may use its Section 122 (“local-into-local”) license to bring an adjacent SV market signal into specific counties within a local market.[53] To give equal effect to both cable and DBS when waiving the network non-duplication and syndicated exclusivity rules during a take-down event, the Commission should temporarily deem the applicable neighboring market to be “significantly viewed.” This would enable satellite’s importation of the adjacent market signal in the same manner as contemplated for cable.

In addition, broadcast stations have the discretion to waive distant network signal restrictions under the Copyright Act if they so choose.[54] The Commission could require the broadcaster to issue such a waiver whenever the broadcaster takes down its signal during a retransmission consent dispute. In either event, the Commission possesses ample authority to apply the concept of network non-duplication and syndicated exclusivity waivers during take-downs in such a way as to maintain parity between DBS and cable.

A. Extending the “Sweeps” Rule to All MVPDs Would be Ineffective At Best and Without Record or Congressional Support at Worst.

Petitioners asking for this proceeding argued in part that the Commission already has in place rules prohibiting cable from taking down programming during the so-called “sweeps” ratings period. The implication, of course, is that Congress, the Commission, broadcasters, and other market participants all recognize that take-downs are harmful and should be avoided.

[53] As DISH has noted in prior proceedings, the FCC has some flexibility in designating significantly viewed stations. For example, in its comments on orphan counties, DISH argued that shifting the evidentiary burden to create a presumption that in-state local broadcast stations are significantly viewed in orphan counties would not affect the Commission’s substantive rules on share of viewership and survey procedures as in place in 1976 for significantly viewed stations. *See* Comments of DISH Network L.L.C., MB Docket No. 10-238, at 8-9 (Jan. 24, 2011).

[54] *See*, *e.g.*, 47 U.S.C. 339(a)(2)(E) and (c)(2); 17 U.S.C. § 119(a)(3)(E).

The Commission asks, however, whether the take-down prohibition during sweeps should be applied to all MVPDs, not just cable. This is like asking whether the fire department should spray water on a house down the block from a burning building. The source of the problem here is the party abusing its unilateral market power: the broadcaster.

Applying the sweeps rule to DBS and other non-cable MVPDs will do nothing to address the crisis at hand. DISH challenges the broadcasters to present any evidence of a non-cable MVPD taking down programming during a retransmission consent negotiation that falls within a sweeps period. The mere fact that the broadcaster alone holds the right to take down or leave in place its station should be proof enough. Lack of sufficient record evidence of DBS or other non-cable MVPD actions would of course present a problem for the Commission upon judicial review. Moreover, Congress has had ample opportunity to apply the "sweeps" prohibition explicitly to DBS. As recently as last year, when it passed the Satellite Television Extension and Localism Act of 2010, Congress could have instructed the Commission to apply the sweeps prohibition expressly to DBS if it thought such action were necessary. Tellingly, it did not.

The prohibition against programming take-downs by MVPDs against broadcasters during market-critical "sweeps" periods, advocated strenuously by the broadcast industry, only supports the contention that programming take-downs are harmful to competition and consumers. Broadcasters know that take-downs harm ratings, which is why they seek protection against such actions. They therefore implicitly acknowledge that take-downs also harm MVPDs and consumers. The Commission concludes that Congress did not "intend to impose a reciprocal [no take-down] obligation on broadcasters during sweeps."[55] It ends its

[55] *Notice* ¶ 39. *See also* 47 U.S.C. § 534(b)(9).

analysis there, however. The Commission need not read the statute so narrowly. Rather, the Commission can and should read the statute to acknowledge that programming take-downs, regardless of who initiates them, are harmful and should be avoided.

The Commission's attempt to distinguish the precedents cited by DIRECTV and DISH as mere bureau-level decisions appears to be a strained attempt to put process before substance.[56] The Commission should acknowledge the obvious: there is a double standard at work with respect to take-down prohibitions. The broadcasters demand a prohibition during sweeps and demand the right to take down programming all other times, whichever serves their interests.

The proper question for the Commission is, given the harmfulness of programming take-downs identified by Congress, what can be done to reduce broadcasters' increasing propensity to rob consumers of the programming they have paid for and undermine competition in the video marketplace? The remedies presented above are a good place to start.

B. The Proposed Notice Rule Would Be Ineffective.

DISH opposes the proposed notice rule. There is no way to adequately "balance useful advance notice against the potential for causing unnecessary anxiety to consumers."[57] DISH agrees that notices of "impending impasses that generally have been provided by broadcasters and MVPDs alike are often little more than ad hominem attacks on the other party."[58] In the event of failed negotiations, the parties should be required to notify the Commission, which in turn would notify the public. Even then, however, notice procedures by themselves fail to address the crisis at hand. Such a notice only hurts MVPDs, not broadcasters, because it

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[56] *See Notice* ¶ 39.

[57] *Id*. ¶ 34.

[58] *Id*. ¶ 37.

induces subscribers to churn to another provider. To preserve a fair competitive balance, any such notice should be accompanied by a requirement that the broadcaster immediately build out to any unserved parts of the DMA (such as through the installation of a repeater tower) and provide free DTV converter boxes to all affected subscribers. Telling consumers that they are about to suffer economic harm does not adequately reduce such harm. Nor does it address the DBS subscriber living in an area not covered by broadcast signals, or the consumer who relied on government assurances and did not acquire a digital over-the-air receiver.

Recently, the Commission's notice to consumers prior to and during the News Corporation take-down of the World Series was inadequate and ineffective for New York area Cablevision subscribers. Millions of New York area Cablevision subscribers who had paid their bills on time and wanted to watch the World Series were not helped by website and blog posts.

V. CONCLUSION.

The record shows incontrovertible evidence of consumer harm caused by the malfeasance and anti-competitive behavior of broadcasters during retransmission consent disputes. The Commission has ample authority in this instance to promote the public interest by updating the retransmission consent rules and fulfilling Congress' vision of a functioning marketplace that aids consumers through the fruits of true competition. It should do so.

Respectfully submitted,

__/s/__________________

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